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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 APPLE INC.,

12 Petitioner,

13 v.

14 AMAZON.COM, INC.,

15 Respondent.
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Case No. 2:17-mc-00070 RSL

**DECLARATION OF THOMAS H.
ZELLERBACH IN SUPPORT OF
MOTION TO COMPEL
COMPLIANCE WITH SUBPOENA**

Underlying case: *Apple Inc. v. Mobile
Star, LLC*, No. 3:16-cv-6001-WHO (N.D.
Cal.)

1 I, Thomas H. Zellerbach, declare as follows:

2 1. I am an attorney admitted to practice in the State of California and the United
3 States District Court for the Northern District of California. I am a partner at Orrick,
4 Herrington & Sutcliffe LLP, and counsel of record for Apple Inc. in the above referenced
5 underlying case. I submit this declaration in support of Apple's Motion to Compel.

6 2. I have personal knowledge of the facts set forth in this declaration could and
7 would competently testify to them under oath if called as a witness.

8 3. Apple Inc. filed suit against Mobile Star, LLC ("Mobile Star") in the Northern
9 District of California on October 17, 2016. The Northern District case number is
10 3:16-cv-6001, and the Hon. William H. Orrick is presiding. Apple alleges that Mobile Star
11 violated the Lanham Act, 15 U.S.C. §§ 1114(1) (Trademark Counterfeiting and Infringement),
12 1125(a)(1)(A) (False Designation of Origin), the Copyright Act, 17 U.S.C. § 501 (Copyright
13 Infringement), and California unfair competition law. A true and correct copy of Apple's
14 complaint in the Northern District of California action is attached as Exhibit A.

15 4. Apple's claims against Mobile Star are, upon information and belief and sworn
16 declarations, based on test purchases of Apple-branded products that Apple made from
17 Amazon.com, Groupon, and Mobile Star. Analyses by Apple showed that these products were
18 counterfeit. Amazon.com identified Mobile Star as a supplier of the counterfeit products that
19 Apple purchased from Amazon.com. Exhibit A ¶¶ 26-32.

20 5. Apple filed a motion for preliminary injunction in the underlying action. In
21 support of its motion for preliminary injunction, Apple submitted the Declaration of Robert
22 Pearson, Apple's Director of Product Safety. Mr. Pearson explained that Apple's test showed
23 that the counterfeit power products were so poorly designed and constructed that they posed
24 serious safety risks to consumers, including the possibility of fire, electric shock, and even
25 electrocution. A true and correct copy of Mr. Pearson's Declaration is attached as Exhibit B.

26 6. Apple also filed a motion for a court order permitting the parties to take
27 expedited discovery prior to the preliminary injunction hearing. With respect to Amazon.com,
28 Apple sought expedited discovery on two specific topics in support of its preliminary

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1 injunction motion: Amazon.com's purchase or acquisition of Apple-branded products from
2 Mobile Star in the past three years and Amazon.com's records substantiating that Mobile Star
3 was the source of products that Apple bought and identified as counterfeit. In its request,
4 Apple specifically reserved its right to take broader discovery from Amazon.com after the
5 parties' Rule 26(f) conference. A true and correct copy of Apple's Motion for Expedited
6 Discovery is attached as Exhibit C.

7 7. A hearing was held on Apple's motion for expedited discovery on November 9,
8 2016. A true and correct copy of excerpts from the transcript is attached as Exhibit D.

9 8. On November 15, 2016, Judge Orrick granted Apple's motion for expedited
10 discovery, stating that "[n]othing in the [order] prejudices either party's ability to take
11 additional discovery following the parties' Rule 26(f) conference." A true and correct copy of
12 the Stipulation & Order Permitting Early Discovery, Setting Preliminary Injunction Briefing
13 Schedule and Continuing Initial Case Management Conference entered by the court is attached
14 at Exhibit E.

15 9. On November 15, 2016, Apple issued, as part of that expedited discovery, a
16 deposition subpoena to Amazon.com, Inc., requiring Amazon.com to provide a Rule 30(b)(6)
17 witness for deposition on December 16, 2016 and to produce documents necessary to Apple's
18 case against Mobile Star, Inc. (the "Expedited Discovery Subpoena"). Apple's subpoena
19 sought testimony on two deposition topics: (1) all Apple-marked products that Amazon.com
20 acquired from Mobile Star in the past three years; and (2) Amazon.com's source for products
21 associated with certain Amazon Standard Identification Numbers ("ASINs") and order
22 numbers. A true and correct copy of Apple's November 15, 2016 Expedited Discovery
23 Subpoena is attached as Exhibit F.

24 10. On November 29, 2016, Amazon.com served objections to Apple's November
25 15, 2016 subpoena, but agreed to produce some set of documents responsive to Apple's
26 request and to produce a witness on "narrower" topics than were requested. Following
27 subsequent discussions with Amazon.com regarding the scope and timing of the deposition,
28 Amazon.com produced a Rule 30(b)(6) witness, Kevin Ireland, for deposition on January 11,

ZELLERBACH DECLARATION

1 2017. Amazon.com's document production and deposition testimony were limited to one
2 method Amazon uses to determine the source of products in its inventory and how that method
3 applies to the twelve ASINs for which Amazon.com had identified Mobile Star as the source.

4 11. The parties stipulated to a preliminary injunction on January 27, 2017, and
5 Judge Orrick entered the preliminary injunction order on January 30, 2017.

6 12. After entry of the preliminary injunction against Mobile Star, the parties held
7 their Rule 26(f) conference on January 31, 2017.

8 13. Following the expiration of the expedited discovery phase of this litigation,
9 Apple served Amazon.com with a subpoena on May 1, 2017, to provide a 30(b)(6) witness to
10 testify on seven topics (the "May 1 Subpoena"). Six of the seven topics were entirely distinct
11 from the topics identified in the Expedited Discovery Subpoena. Only one topic overlapped at
12 all with a topic identified for testimony in the Expedited Discovery Subpoena; Apple sought
13 testimony on the identity and quantity of Apple-branded products that Amazon.com acquired
14 from Mobile Star for the four years prior to suit—to cover the accounting period for Apple's
15 recovery of profits from Mobile Star—instead of just for the past three years. A true and
16 correct copy of Apple's May 1 Subpoena is attached as Exhibit G.

17 14. On May 10, 2017, I spoke with counsel for Amazon.com. Counsel indicated to
18 me that Amazon.com was probably not available to attend the deposition on the scheduled
19 date, but stated that he would check on another date. On May 11, 2017, counsel for
20 Amazon.com wrote me an email confirming that May 17, 2017 would not work for
21 Amazon.com and that he would get back to me once he and Amazon.com had a better sense of
22 timing.

23 15. On May 15, 2017, Amazon.com served objections to Apple's May 1, 2017
24 subpoena, but failed to propose an alternative date for the deposition or even agree to provide a
25 Rule 30(b)(6) witness. A true and correct copy of Amazon.com's May 15, 2017 Objections to
26 Apple's Subpoena to Nonparty Amazon is attached as Exhibit H.

27 16. On May 16, 2017, Mobile Star served a subpoena on Amazon.com, seeking
28 document production and deposition testimony from a 30(b)(6) corporate representative (the
ZELLERBACH DECLARATION

1 “Mobile Star Subpoena”). The three topics set forth in the Mobile Star Subpoena are distinct
2 and separate from the topics identified in Apple’s subpoenas. A true and correct copy of the
3 Mobile Star Subpoena is attached as Exhibit I.

4 17. On May 30, 2017, Apple served a Notice of Amended Subpoena Issued to
5 Amazon.com, Inc. (the “Amended Subpoena”). The Amended Subpoena set forth a new
6 deposition date because the date set forth in the May 1 Subpoena had passed and Amazon.com
7 had failed to provide any alternative dates. The Amended Subpoena set forth topics that were
8 functionally identical to those contained in the May 1 Subpoena. The Amended Subpoena also
9 set forth a number of document requests. A true and correct copy of the Amended Subpoena is
10 attached as Exhibit J.

11 18. On May 30, 2017, I informed Amazon.com’s counsel that Apple was willing to
12 discuss alternative dates for compliance with the subpoena. A true and correct copy of my
13 email is attached as Exhibit K.

14 19. On June 13, 2017, Amazon.com served objections to Apple’s May 30, 2017
15 subpoena. Among other things, Amazon.com objected to Apple’s issuance of “serial
16 subpoena[s].” Referring to the Subpoena for Expedited Discovery, Amazon.com objected that
17 it had already provided a Rule 30(b)(6) witness and that Apple’s Amended Subpoena “imposes
18 [an] undue burden and is inconsistent with the spirit and purpose of the Federal Rules.” A true
19 and correct copy of Amazon.com’s June 13, 2017 Objections to Apple’s Subpoena to
20 Nonparty Amazon is attached as Exhibit L.

21 20. On June 20, 2017, I spoke with Amazon.com’s counsel, John Goldmark, by
22 telephone. Mr. Goldmark indicated that Amazon.com was in the process of gathering
23 documents, but that Amazon.com was disinclined to produce a witness for deposition.

24 21. On June 21, 2017, I wrote to Amazon.com, explaining that the Expedited
25 Discovery Subpoena ordered by the court was narrowly tailored so that Apple could obtain
26 basic information on an expedited basis in connection with its preliminary injunction motion.
27 I also advised Amazon.com that the court’s order explicitly contemplated that Apple would be
28 permitted to take broader discovery after the parties’ Rule 26(f) conference. A true and correct

1 copy of my letter is attached as Exhibit M.


2 22. On June 28, 2017, Apple served a Second Amended Deposition Subpoena to
3 Amazon.com setting July 7, 2017 as the date for deposition (the "Second Amended
4 Subpoena"). Apple served the Second Amended Subpoena because the deposition date set
5 forth in the Amended Subpoena had passed without resolution of whether the deposition
6 would proceed. The Second Amended Subpoena contained functionally identical deposition
7 topics as the May 1 Subpoena and the Amended Subpoena. It also contained document
8 requests identical to those set forth in the Amended Subpoena. A true and correct copy of
9 Apple's June 28, 2017 Second Amended Subpoena, with certificate of service, is attached as
10 Exhibit N.

11 23. On June 29, 2017, counsel for Amazon.com responded to my June 21, 2017
12 letter. Amazon.com argued, among other things, that evidence of willful infringement could
13 be obtained directly from Mobile Star. A true and correct copy of this correspondence is
14 attached as Exhibit O.

15 24. On July 5, 2017, Amazon.com served objections to Apple's June 28, 2017
16 subpoena, objecting for the very first time that "Apple's subpoena violates Rule 30's one
17 deposition rule, rendering it invalid and null and void." A true and correct copy of
18 Amazon.com's July 5, 2017 Objections to Apple's Subpoena to Nonparty Amazon is attached
19 as Exhibit P.

20 25. Amazon.com also made clear that no witness would appear on July 7, 2017. A
21 true and correct copy of Mr. Goldmark's email is attached as Exhibit Q.

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23 I declare under penalty of perjury that the forgoing is true and correct. Executed on
24 this 11th day of July, 2017.

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27 Thomas H. Zellerbach
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